

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

CHARLES V. FARNSWORTH,)	
)	
Plaintiff,)	CASE NO. C07-395-RSL-MJB
)	
v.)	
)	
JOHNATHAN MICHAELS,)	REPORT AND RECOMMENDATION
)	
Defendant.)	
_____)	

I. INTRODUCTION AND SUMMARY CONCLUSION

Plaintiff Charles Farnsworth is a state prisoner proceeding *pro se* in this civil rights action pursuant to 42 U.S.C. § 1983. Plaintiff's second amended complaint, which names only Johnathan Michaels as defendant,¹ alleges violations of his rights of due process, meaningful access to communicate with and petition the court, freedom of speech, and equal protection of the law under the First and Fourteenth Amendments of the United States Constitution and under article I, section 22 of the Washington State Constitution. Plaintiff seeks damages, as well as declaratory and injunctive relief.

¹Plaintiff's first amended complaint named Johnathan Michaels and Correctional Sergeant John Doe as defendants.

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2 This action was originally filed in the Snohomish County Superior Court, then later
3 removed to this Court by Defendant on March 14, 2007. (Dkt. #1). Now before the Court is
4 Plaintiff's motion for summary judgment (Dkt. #7), which was filed in the state court prior to
5 removal of this action and, subsequently noted in this Court on March 27, 2007. (Dkt. #8). On
6 April 3, 2007, Defendant filed a motion to dismiss Plaintiff's case pursuant to Fed. R. Civ. P.
7 12(b)(6). (Dkt. #9). Defendant has filed a response opposing Plaintiff's summary judgment
8 motion (Dkt. #11), and Plaintiff filed a reply (Dkt. #13). Likewise, Plaintiff has filed a response
9 opposing Defendant's motion to dismiss (Dkt. #14) and Defendant filed a reply (Dkt. #16).
10 Additionally, on June, 1, 2007, Plaintiff filed a letter/motion requesting that he be allowed to
11 dismiss this action without prejudice and later re-file the action after his anticipated transfer back
12 into the federal [prison] system in August. (Dkt. #18). The Court construes this latter motion as
13 a motion for voluntary dismissal under Fed. R. Civ. P. 41.

14 Having considered the pending motions and responses, and the balance of the record, this
15 Court recommends that Defendant's motion to dismiss for failure to state a claim be GRANTED
16 and that Plaintiff's action be dismissed with prejudice.

17 II. BACKGROUND

18 Plaintiff's complaint alleges that on July 22, 2005, defendant Michaels, who was
19 Plaintiff's counselor at the Washington State Reformatory, returned several envelopes of
20 properly marked legal mail with a notice stating:

21 The mailroom Sgt. returned these & more to follow because your debt balance is
22 extreme. Per that Sgt., you are only allowed to send \$4.00 of indigent legal mail
per week.

23 (Dkt. #4, Pleadings Part 5 at 24). Plaintiff asserts that during a subsequent conversation,
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1 Defendant informed him that this action was taken pursuant to Policy Directive 450.100 XIII.²
 2 *Id.*

3 Plaintiff indicates that after reviewing the policy, he requested an additional \$4.00 per
 4 week of indigent legal mail pursuant to Policy Directive 450.100 XIII(D)(1)(a) and (b).³ *Id.*

5 Although Plaintiff's request was granted, he claims that the additional postage was insufficient
 6 for his needs. *Id.* Plaintiff contends that because of the defendant's restrictive postage policy
 7 directive, he does not have meaningful access to the courts. *Id.*

8 III. DISCUSSION

9 A. Plaintiff's Motion for Summary Judgment

10 Plaintiff seeks summary judgment on his claims that Defendant violated his rights under
 11 the First and Fourteenth Amendments of the United States Constitution. (Dkt. #4, Pleadings
 12 _____)

13 ²The Washington State Department of Corrections (DOC) Policy Directive 450.100 XIII(D)
 14 provides, in pertinent part, that "[i]ndigent offenders may receive postage credit up to the equivalent of 10
 15 first class pre-franked envelopes per week for mailing costs, including *legal mail*, if they have outgoing
 16 mail." (Dkt. #4, Pleading Part 2 at 8).

16 ³DOC Policy Directive 450.100(D)(1) states:

17 If an *indigent offender* has used all the postage allowed for mailing *legal mail*, s/he may
 18 receive postage that equates to 10 additional first class pre-franked envelopes per week for
 19 *legal mail* if all the following conditions are met:

- 19 (a) The offender demonstrate to his/her Counselor that the legal document to be
 20 mailed is a personal restraint petition complaint, amended complaint, answer or
 21 reply to an answer in a habeas corpus action, or a civil rights action challenging
 22 the offender's conditions of confinement, or,
- 23 (b) The offender has insufficient funds in his/her account to send the legal document,
 24 notwithstanding the Department's indigency standard, and must agree, by filling
 25 out a disbursement request to use all funds currently in his/her account to
 26 immediately pay for the requested *legal mail* postage.

24 (Dkt. #4, Pleading Part 2 at 8).

25 REPORT AND RECOMMENDATION

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1 Part 5 at 50). Defendant argues that Plaintiff's summary judgment motion should not be
2 considered by the Court because it was not timely filed pursuant to Fed. R. Civ. P. 56(a), and if
3 the Court considers and grants Defendant's motion to dismiss, any further proceedings in this
4 matter would be rendered moot. (Dkt. #11).

5 Under Fed. R. Civ. P. 56(a), a party seeking to recover upon a claim may, "at any time
6 after the expiration of 20 days from the commencement of the action . . . , move with or without
7 supporting affidavits for a summary judgment in the party's favor as to all or any part thereof."
8 In this case, Defendant argues that Plaintiff's summary judgment motion, which was filed on
9 March 10, 2007, was not timely filed because this action was not commenced until after the
10 Complaint was amended for the fourth time on March 7, 2007, or until the case was removed to
11 this Court on March 14, 2007. (*Id.* at 1). This argument is without merit.

12 A civil action is commenced by filing a complaint with the court. Fed. R. Civ. P. 3. In
13 Defendant's pending motion to dismiss, which he filed before responding to Plaintiff's summary
14 judgment motion, Defendant acknowledges that Plaintiff filed his original complaint in
15 Snohomish County Superior Court on September 22, 2005. (Dkt. #9 at 1 n.1). Thus, this
16 action was clearly commenced almost 18 month before Plaintiff's current summary judgment
17 motion was filed, and thus, the motion was timely filed under Fed. R. Civ. P. 56(a).

18 However, in light of this Court's recommendation in section B below that Defendant's
19 motion to dismiss should be granted, the claims presented in Plaintiff's summary judgment
20 motion are rendered moot.

21 B. Defendant's Motion to Dismiss

22 Defendant moves this court to dismiss Plaintiff's § 1983 action pursuant to Fed. R. Civ. P.
23 12(b)(6) on grounds that: (1) Plaintiff has failed to state a claim upon which relief may be
24 granted; (2) Plaintiff has failed to allege that Defendant personally participated; and (3) even it a

1 violation occurred and Defendant participated in that violation, he is entitled to qualified
2 immunity. In response, Plaintiff argues that these grounds for dismissal are res judicata because
3 they are identical to issues denied by the state court on a prior cross-motion for summary
4 judgment that Defendant filed in December 2006.⁴ (Dkt. #14 at 2). Plaintiff, therefore, urges
5 this Court to accept the state court's judgment as its own and deny Defendant's motion to
6 dismiss.

7 The Supreme Court has instructed that "once a case has been removed to federal court, it
8 is settled that federal rather than state law governs the future course of proceedings,
9 notwithstanding state court orders issued prior to the removal." *Preaseau v. Pudential Ins. Co.*
10 *of America*, 591 F.2d 74, 79 (9th Cir. 1979) (quoting *Granny Goose Foods, Inc. v. Brotherhood*
11 *of Teamsters*, 415 U.S. 423, 437, 94 S.Ct. 1113, 1123, 39 L.Ed.2d 435 (1974)). The Ninth
12 Circuit has also held that "[t]he federal rules apply after removal" and "[t]he federal court . . .
13 treats everything that occurred in the state court as if it had taken place in federal court." *Butner*
14 *v. Neustadter*, 324 F.2d 783, 785 (9th Cir. 1963) (footnote omitted). Under federal law, an
15 order denying a motion for summary judgment is generally interlocutory and "subject to
16 reconsideration by the court at any time." See *Dessar v. Bank of America Nat. Trust and*
17 *Savings Assoc.*, 353 F.2d 468, 470 (9th Cir. 1965) (footnote omitted).

18 Applying these principles in *Preaseau*, the Ninth Circuit held that the federal court,
19 within its discretion and for "cogent" reasons, could grant summary judgment notwithstanding an
20 earlier denial of summary judgment by the state court. 591 F.2d at 80. Likewise, it is within
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23 ⁴Under the doctrine of res judicata, "a final judgment on the merits bars further claims by
24 parties or their privies based on the same cause of action." *Montana v. United States*, 440 U.S.
147, 153, 99 S.Ct. 970, 59 L.Ed.2d 210 (1979).

1 this Court's discretion to consider the grounds for dismissal in Defendant's motion despite the
2 state court's denial of Defendant's prior motion for summary judgment on the same grounds.

3 Moreover, even if state law were applicable here, this result would be unchanged.
4 Washington courts have held that denial of a motion for summary judgment is not appealable.
5 *Zimny v. Lovric*, 59 Wn. App. 737, 739, 801 P.2d 259, 260 (1990) (citing *Roth v. Ball*, 24 Wn.
6 App. 92, 600 P.2d 602 (1979)). The courts have also stated that an order which is not
7 appealable is not a final judgment and has no res judicata effect. *McClean v. Smith*, 4 Wn. App.
8 394, 400, 482 P.2d 798, 802 (1971). Accordingly, even under state law, res judicata would not
9 operate to bar this Court's reconsideration of the issues in Defendant's motion to dismiss.

10 1. Failure to State a Claim

11 An action should be dismissed for failure to state a claim only if "it appears beyond doubt
12 that plaintiff can prove no set of facts in support of his claims that would entitle him to relief."
13 *See Schowengerdt v. General Dynamics Corp.*, 823 F.2d 1328, 1332 (9th Cir. 1987) (citing
14 *Conley v. Gibson*, 355 U.S. 41, 45-46, 78 S.Ct. 99, 2 L.Ed.2d 80 (1957)). Dismissal can be
15 based on the lack of a cognizable legal theory or the absence of sufficient facts alleged under a
16 cognizable legal theory. *Balistreri v. Pacifica Police Dept.*, 901 F.2d 696, 699 (9th Cir. 1990).
17 In resolving a motion to dismiss for failure to state a claim, the Court must assume that the
18 plaintiff's allegations are true and construe all of the facts before it in favor of the plaintiff.
19 *Schowengerdt*, 823 F.2d at 1332. However, a motion to dismiss only admits, for the purposes of
20 the motion, all well-pleaded facts in the complaint, as distinguished from conclusory allegations.
21 *Mitchell v. King*, 537 F.2d 385, 386 (10th Cir. 1976); *see also Jones v. Community*
22 *Redevelopment Agency*, 733 F.2d 646, 649 (9th Cir. 1984) (conclusory allegations unsupported
23 by facts are insufficient to state a claim under § 1983).

1 In order to sustain a cause of action under 42 U.S.C. § 1983, the plaintiff must show (1)
2 that he suffered a violation of rights protected by the Constitution or created by federal statute,
3 and (2) that the violation was proximately caused by a person acting under color of state law.
4 *See Crumpton v. Gates*, 947 F.2d 1418, 1420 (9th Cir. 1991). In addition, a plaintiff must allege
5 facts showing how individually named defendants caused or personally participated in causing
6 the harm alleged in the complaint. *Arnold v. IBM*, 637 F.2d 1350, 1355 (9th Cir. 1981).

7 (a) *Due Process, Free Speech and Equal Protection Rights*

8 Here, Defendant argues that Plaintiff has failed to articulate how the defendant violated
9 his right to freedom of speech, his right to due process, or his right to equal protection. This
10 Court agrees. Other than a broad, conclusory assertion in its opening paragraph that these
11 constitutional rights were violated, Plaintiff's second amended complaint makes no specific
12 factual allegations showing how these rights were violated or how Defendant participated in the
13 violations. Accordingly, the undersigned recommends that these claims be dismissed because
14 Plaintiff has failed to state a claim under § 1983.

15 (b) *Access to the Courts*

16 Plaintiff claims that he neither has meaningful access to the courts, nor is he able to
17 communicate with or petition the court in a meaningful way because of Defendant's restrictive
18 postage policy directive. (Dkt. #4, Pleadings Part 5 at 24). Defendant argues that Plaintiff's
19 claim concerning indigent postage should be dismissed as a matter of law for failure to state a
20 claim.

21 Prisoners have a constitutional right of access to the courts. *See Lewis v. Casey*, 518
22 U.S. 343, 346, 116 S.Ct. 2174, 135 L.Ed.2d 606 (1996); *Bounds v. Smith*, 430 U.S. 817, 821 ,
23 97 S.Ct. 1491, 52 L.Ed.2d 72 (1977). This right includes provision of postage stamps at state
24 expense for indigent inmates to mail legal documents. *Bounds*, 430 U.S. at 824-25; *King v.*

1 *Atiyeh*, 814 F.2d 565, 568 (9th Cir. 1987). However, prisoners do not have an unlimited right to
2 free postage in connection with the right of access to courts. *Bach v. Coughlin*, 508 F.2d 303
3 (7th Cir. 1974). A state may adopt reasonable postage stamp regulations. *Atiyeh*, 814 F.2d at
4 568 (citations omitted). There is no established minimum requirement that a state must meet in
5 order to provide indigent inmates with adequate access to the courts. Instead, a reviewing court
6 should focus on whether the individual plaintiff before it has been denied meaningful access. *Id.*
7 To state a claim for which relief can be granted based on denial of legal postage, an inmate must
8 allege an actual injury: a specific instance in which he was actually denied access to the courts.
9 *See Sands v. Lewis*, 866 F.2d 1166, 1171 (9th Cir. 1989).

10 Plaintiff alleges that because of Defendant's postage policy directive, Plaintiff is unable to
11 file a PRP on these issues, he has had to withdraw two civil complaints, and he is unable to file a
12 habeas corpus petition in federal court on a PRP denied in the state supreme court because he is
13 without postage to do so. (Dkt. #4, Pleadings Part 5 at 24-25). However, these broad, general
14 allegations fail to demonstrate that Plaintiff was actually denied access to the courts as a result of
15 the postage policy directive. The record reflects that Plaintiff filed and served numerous
16 pleadings in the current action, and Plaintiff acknowledges in his second amended complaint that
17 he has an appeal in Division II of the state court of appeals, he has approximately twelve (12)
18 civil cases in both state and federal courts, he has two appeals in the Ninth Circuit, and one
19 appeal in the Tenth Circuit. (*Id.* at 24). Moreover, Plaintiff has made no allegations that he
20 missed a particular filing deadline, that any case was dismissed or that any sanctions were
21 imposed by the courts due to impact of the postage policy directive. Because Plaintiff fails to
22 show any actual injury to his right of access to courts, he fails to state a claim for which relief can
23 be granted.

2. Additional Grounds for Dismissal

Defendant also argues for dismissal of Plaintiff's complaint on grounds that Plaintiff failed to allege how Defendant's actions amounted to personal participation in the alleged denial of his access to courts, and that Defendant is entitled to qualified immunity. Having reached the conclusions in section "B.1" above, this court need not address these issues.

C. Plaintiff's Motion for Dismissal

Although Plaintiff seeks dismissal without prejudice so that he can later re-file this action, it is clear that he does not have a viable action against Defendant based on the facts contained in the record. Additionally, Defendant has demonstrated that dismissal is required as a matter of law.

IV. CONCLUSION

For the reasons stated above, the Court recommend that Defendant's motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(6) be GRANTED and this case be dismissed with prejudice. The Court further recommends that Plaintiff's motion for voluntary dismissal be DENIED, and that Plaintiff's motion for summary judgment be STRICKEN as moot. A proposed Order accompanies this Report and Recommendation.

DATED this 5th day of July, 2007.



MONICA J. BENTON
United States Magistrate Judge